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No. 03-501

IN THE

Supreme Court of the United States

STANFORD HOSPITAL AND CLINICS, SUCCESSOR TO UCSF STANFORD HEALTH CARE,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

The HR Policy Association respectfully submits this brief *amicus curiae* with the consent of the parties.[1] The brief supports the petition of Stanford Hospital and Clinics urging

[1] Counsel for the *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. A letter of consent from counsel for each party has been filed with the Clerk of the Court.

this Court to issue a writ of certiorari to review the decision of the court of appeals in *Stanford Hosp. and Clinics v. NLRB*, 325 F.3d 334, *reh'g denied*, ___ F.3d ___ (D.C. Cir. 2003).

INTEREST OF THE *AMICUS CURIAE*

The HR Policy Association (the Association) is an organization representing the senior human resource officers of more than 200 of the nation's largest private sector companies. Collectively, its members employ nearly 13 million Americans, more than 12 percent of the U.S. private sector workforce. Since the Association's founding in 1939, its principal mission has been to ensure that laws and policies affecting human resources, including labor relations, are sound, practical and responsive to the realities of the modern workplace.

All of the Association's members are employers subject to the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.* A number of them operate health care facilities and, thus, have a direct interest in the extent to which the NLRA permits health care institutions to protect patients from disturbance during their treatment and convalescence by prohibiting employee solicitation and distribution of written materials in areas of a hospital or clinic that are frequented by patients and their families.

On a more general level, many of the Association's members operate business establishments where they regularly receive and entertain customers or patrons on company property. These companies have an abiding interest in the extent to which employers subject to the NLRA may control the use of their property and protect their customer relationships by limiting potentially disruptive solicitation and distribution directed at nonemployees on company premises. Thus, the interests of the *amicus curiae* and its members are affected in a substantial and ongoing way by the

holdings of the National Labor Relations Board and the court of appeals in this case.

STATEMENT OF THE CASE

The relevant facts are detailed in the petition. Briefly, the petitioner operates two acute care hospitals. Both provide treatment to patients with life-threatening illnesses, and both emphasize the importance of family support as a critical part of patient care and convalescence. The hospitals have various sitting rooms, waiting areas and connecting spaces where patients and family members can be together, await procedures and test results, confer with physicians and ponder decisions about treatment. Some of these areas are within designated "patient" or "nursing" units, and some are outside such units.

During a union organizing campaign, hospital employees and full-time union organizers solicited and distributed handouts to employees and nonemployees both on and off the hospitals' premises. In response, the hospitals adopted a joint policy intended to "'avoid disrupting patient care and to prevent disturbing our patients and their families.'" *Stanford Hosp.*, 325 F.3d at 336 (citing NLRB opinion). Among other things, the policy prohibited solicitation of *employees* at any time in "patient care areas," which it defined as "'patient rooms, patient treatment and procedure rooms or areas, patient admitting or registration areas, patient waiting rooms, lounges used by patients and other families or visitors, and the hallways immediately adjacent to all such areas.'" *Id.* at 337. Some of the lounges and waiting areas encompassed in this definition were located within designated patient or nursing units, and some were outside such units. *Id.* The policy also prohibited employees from soliciting or distributing literature to *nonemployees* on the hospitals' premises at any time. *Id.*

On unfair labor practice charges filed by the union, the National Labor Relations Board (NLRB or Board) held, *inter alia*, that the hospitals' general ban on employee solicitation and distribution activities directed at nonemployees violated Section 8(a)(1) of the NLRA, because the hospitals had not shown that the ban was needed to protect patients. *UCSF Stanford Health Care*, 335 NLRB 488 (2001), *enforced*, 325 F.3d 334 (D.C. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3268 (Sept. 29, 2003). The Board also held that insofar as the hospitals' policy banned solicitation and distribution directed at employees in lounges and waiting areas outside patient units, it violated Section 8(a)(1), because the hospitals had failed to show that solicitation and distribution in those areas would be likely to interfere with patient care. *Id.*

On review, the D.C. Circuit upheld both of these Section 8(a)(1) findings. With respect to the ban on solicitation and distribution aimed at nonemployees on hospital premises, the court of appeals declared that NLRA precedents make no "substantive distinction between solicitation of fellow employees and solicitation of nonemployees." *Stanford Hosp.*, 325 F.3d at 343. It went on to hold that the employees' right under Section 7 of the NLRA to solicit nonemployees outweighed any countervailing interest shown by the hospitals. *Id.* at 342-45. In doing so, the court of appeals brushed aside as mere "dicta", *id.* at 344, statements by this Court indicating approval of a hospital's rule that read: "There is to be no soliciting of the general public (patients, visitors) on Hospital property." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 486 and 503 n.23 (1978).

In striking down the hospitals' ban on solicitation and distribution in lounges and waiting areas frequented by patients and their families, the court of appeals adopted the NLRB's narrow view of the areas of a hospital in which solicitation and distribution activities are presumptively likely

to be disruptive of patient care. The court specifically declined to follow precedents holding that hospitals lawfully could ban such activities in lounges, waiting rooms, corridors and similar areas frequented by patients and their families, and purported to distinguish this Court's decision in *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). Nowhere in its opinion did the court of appeals take into account evidence that the hospitals' policy left many other areas of the hospitals open for solicitation and distribution activities directed at employees.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The court of appeals' declaration that there is no substantive distinction in federal labor law between solicitation of fellow employees and solicitation of nonemployees is of great concern to employers nationwide, and is particularly alarming to those in the health care field. The court's blunt pronouncement appears to contradict years of NLRA precedents upholding the right of employers to ban workplace solicitations likely to disrupt relations with nonemployees whose patronage and good will are vital to an employer's business, such as a retail store's customers, a restaurant's diners, or a hospital's patients and their families. The decision calls into question all workplace policies that differentiate between solicitation of employees and solicitation of nonemployees. It thus raises an issue of broad national importance warranting review by this Court.

Prior to this decision, employers in health care and other industries could reasonably conclude, based on language in this Court's *Beth Israel* opinion, that they lawfully could adopt "a rule forbidding any distribution to or solicitation of nonemployees" on their property. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 503 n.23 (1978). By striking down precisely such a rule in this case, the court of appeals has created

widespread confusion and uncertainty that only this Court can now resolve.

The court of appeals' refusal to recognize areas such as hospital lounges, sitting rooms and corridors that are frequented by patients and their families as "patient care areas" is also perplexing in light of this Court's express recognition in *Baptist Hospital* of "[t]he increased emphasis in modern hospitals on the mobility of patients as an important aspect of . . . patient care." *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 784 (1979). This Court cogently observed that "[s]mall public rooms or sitting areas on the patient-care floors, as well as the corridors themselves, provide places for patients to visit with family and friends, as well as for doctors to confer with patients' families—often during times of crisis." *Id.* If those observations do *not* mean that all such areas of a hospital are within the zone in which rules banning solicitation and distribution are presumptively valid, this Court needs to say so.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECLARATION THAT THERE IS NO SUBSTANTIVE DISTINCTION IN FEDERAL LABOR LAW BETWEEN SOLICITATION OF FELLOW EMPLOYEES AND SOLICITATION OF NONEMPLOYEES RAISES AN IMPORTANT QUESTION THAT WARRANTS REVIEW BY THIS COURT.

This case presents an important question of federal labor law that has nationwide ramifications, not only for health-care but potentially for other industries as well. There is no dispute that employees have a right under Section 7 of the NLRA, 29 U.S.C. § 157, to communicate with both fellow employees and nonemployees about matters such as their desire for unionization and their concerns about terms and

conditions of employment. But, as this Court has long recognized, that right does not exist in a vacuum. Rather, it must be accommodated with important employer rights and interests, including the rights of employers "to maintain discipline in their establishments," *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945), to control the use of their property, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and to command loyalty and prevent disparagement of their products and services by their own employees. *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953). At issue in this case is the extent to which the NLRA also accommodates the right of employers to control the nature and substance of their employees' interactions with customers, patrons and other nonemployees on the employers' premises.

Solicitations directed at nonemployees have a potential to harm an employer's business interests in ways that communications solely among fellow employees do not. For example, solicitation of nonemployees may disturb the ambience of a business establishment and undermine good will for the employer. Just as Americans tend to resent uninvited calls to their homes by telephone solicitors, many are likely to feel alienated and uncomfortable when approached and solicited by union activists at establishments to which they have gone to shop, dine, be entertained, receive treatment or transact other business. Many will react by taking their business elsewhere. Thus, a substantive distinction between solicitation of employees and solicitation of nonemployees exists in the real world, whether the D.C. Circuit recognizes it or not.

Indeed, recognition of this substantive distinction has long been implicit in NLRA precedents and is essential to a proper administration of the Act. Thus, the NLRB and the courts have long approved greater restrictions on solicitation in work environments where nonemployees are likely to be present than where only employees are involved. For example, they

have upheld total bans on solicitation and distribution activities on the selling floors of retail stores. *See Famous-Barr Co.*, 59 N.L.R.B. 976 (1944), *enforced sub nom. NLRB v. May Dep't Stores Co.*, 154 F.2d 533 (8th Cir. 1946). Similarly, the Board has held that "restaurants, . . . because of the nature of their business, may prohibit solicitation . . . in areas in which customers are likely to be present." *Marriott Corp.*, 223 N.L.R.B. 978 (1976) (footnote omitted).

Nowhere has this substantive distinction been more clearly recognized—at least until now—than in the hospital context. In 1978, this Court observed that "in the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978). The following year, the Court reiterated and expanded upon the importance of this interest in *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-85 (1979). Thus, it is a hospital's interest in protecting a class of *nonemployees*—its patients—against the potentially disruptive effects of solicitation, and thereby preventing interference with the hospital's basic business mission—patient care—that justifies its imposition of greater restrictions on solicitation affecting these nonemployees than would be allowable if only fellow employees were involved. But this type of interest, while particularly compelling in the hospital context, is not unique to the health-care field. Employers in virtually all fields have a significant, ongoing business interest in preventing employees from engaging in potentially disruptive encounters on their premises with nonemployees on whose good will the employers' business depends.

The court of appeals' suggestion that employers have no greater right to restrict solicitation of nonemployees than of employees on their premises thus flies in the face of important NLRA principles and raises serious concerns for employers, not just in health-care, but throughout industry. It

creates doubt in an area where clear rules are needed. Review by this Court is urgently needed to relieve these doubts and clarify this important area of NLRA law.

II. REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE APPARENT CONFLICT BETWEEN THE COURT OF APPEALS' HOLDING AND THIS COURT'S STATEMENTS IN *BETH ISRAEL* INDICATING APPROVAL OF "A RULE FORBIDDING ANY DISTRIBUTION TO OR SOLICITATION OF NONEMPLOYEES."

Employers need clear rules if they are to operate effectively within the law. Many employers, particularly in the health-care field, undoubtedly thought this Court was providing such a clear rule when it wrote, in an opinion dealing with employee solicitation and distribution in a hospital, that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 503 n.23 (1978). Indeed, the Court specifically noted that the employer in that case "in fact, has such a rule," *id.*, and recited the rule in its opinion: "There is to be no soliciting of the general public (patients, visitors) on Hospital property." *Id.* at 486 (citation omitted).

While it is perhaps true, as the court of appeals here said, that the above-quoted statements are technically dicta, since the hospital's blanket ban on solicitation of nonemployees on its property had not even been challenged in *Beth Israel*, those statements in this Court's opinion, authored by Justice Brennan, clearly seemed to be suggesting a lawful means of regulating workplace solicitation that was available as an alternative to the policy that was in fact challenged in that case. Indeed, Justice Brennan observed that the NLRB had "not foreclosed" the hospital from adopting such a blanket ban on solicitation of nonemployees. *Id.* at 503. He even went so far as to point out an advantage of such a rule, noting

that it "could be readily enforced" at the hospital. *Id.* at 503 n.23.

In light of these statements, it would not have been unreasonable, following the issuance of this Court's *Beth Israel* decision, for other hospitals to adopt rules modeled after Beth Israel's general ban on "soliciting of the general public (patients, visitors)" on hospital property. Indeed, given the strong indication in that case that this Court would view such rules as uncontroversial, even employers outside the health-care field reasonably could interpret that decision as an endorsement of rules banning solicitation of non-employees on their premises.

Thus, the D.C. Circuit's decision to strike down a hospital rule virtually identical to the one Justice Brennan described with such apparent approval in *Beth Israel* comes as a shock to employers throughout the country. The result is further confusion that only this Court can now alleviate.

III. REVIEW BY THIS COURT IS NECESSARY TO ELIMINATE CONFLICT AND CONFUSION OVER THE DEFINITION OF "PATIENT CARE AREAS" WITHIN WHICH HOSPITAL RULES PROHIBITING SOLICITATION AND DISTRIBUTION ARE PRESUMPTIVELY VALID.

Also productive of confusion and conflict in the law is the court of appeals' adoption in this case of a narrow definition of the "patient care areas" of a hospital within which rules banning solicitation and distribution are presumptively valid. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978). At bottom, the court of appeals failed to recognize the implications of the basic point this Court emphasized in *Baptist Hospital—i.e.*, that an important aspect of patient care in modern hospitals is patient mobility. *NLRB v. Baptist Hosp.*, 442 U.S. 773, 784 (1979). That point is even more true today.

This Court clearly understood that hospital lounges, sitting rooms, corridors and other areas where patients and their family members meet, await procedures and test results, confer with doctors and participate in convalescent activities are all important patient care areas, even if they are not located within areas specifically designated as "patient" or "nursing" units. Thus, the Court observed in *Baptist Hospital* that, in modern hospitals, "[p]atients not undergoing treatment at the moment are cared for in a variety of settings—recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even the corridors where patients often are encouraged to walk, or visit with their families." *Id.* at 789 n.16.

Although the court of appeals quoted from this Court's *Baptist Hospital* decision on this point, *Stanford Hosp.*, 325 F.3d at 341, it illogically concluded that areas outside designated patient or nursing units were not "patient care areas" in which solicitation would presumptively be disruptive, because it found that the petitioners had failed to prove that solicitation in those areas would in fact be disruptive. *Id.* at 342. Thus, the court purported to distinguish its own prior decisions in *Baylor University Medical Center v. NLRB*, 578 F.2d 351 (D.C. Cir. 1978) (upholding a ban on solicitation in hospital corridors), and *Baylor University Medical Center v. NLRB*, 662 F.2d 56 (D.C. Cir. 1981) (upholding a partial ban on solicitation and distribution in a hospital cafeteria), on the grounds that the hospital in those cases had presented evidence that solicitation in its corridors and cafeteria would disrupt patients and visitors, while the court found that Stanford had presented no such proof in this case. But that reasoning simply denied Stanford the benefit of the presumption to which it was entitled if, in fact, the areas in question were "patient care areas."

In *Baptist Hospital*, this Court called upon the NLRB to frame clear rules governing solicitation and distribution in

hospitals, taking into account that patients are "cared for in a variety of settings" extending beyond immediate treatment rooms to a wide variety of other areas frequented by patients and their families. *Baptist Hosp.*, 442 U.S. at 789 n.16. Yet, twenty-four years later, the law on this point is still characterized by confusion and conflict. The petition in this case provides an opportunity for this Court to revisit this issue and provide additional, much-needed guidance.

CONCLUSION

The issues presented in this case are of great importance not only to the health-care field, but to industries in general. For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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